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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-655

DICK WILSON, *et al.*,

Petitioners,

v.

RUSSELL MEANS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No.

DICK WILSON, *et al.*,

Petitioners,

v.

RUSSELL MEANS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners, Richard "Dick" Wilson, Glenn Three Stars, and Bennie "Tote" Richards respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 5, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears as Appendix A hereto. The opinion rendered by the District Court for the District of South Dakota, Western Division, reported at 383 F. Supp. 378 (D.S.D. 1974), appears as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on August 5, 1975. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether supporters of a candidate for political office form a class which is sufficiently discrete so that allegations of harassment of such supporters, not otherwise specifically identified, by opponents of the candidate, state a claim upon which relief can be granted pursuant to 42 U.S.C. Sec. 1985(3).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

Sec. 1985(3) Depriving persons of rights or privileges . . .

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an

elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

This action was initially brought by respondents, an unsuccessful candidate for the presidency of the Tribal Council of the Oglala Sioux Tribe of South Dakota and twenty-seven of his supporters, invoking the jurisdiction of the District Court under 25 U.S.C. Sections 1301-1303, 28 U.S.C. Section 1343, and 42 U.S.C. Sections 1985(3), 1986 and 1988. All the respondents are members of the Oglala Sioux Tribe of Indians. Petitioners are Richard "Dick" Wilson, the current President of the Tribal Council of the Oglala Sioux Tribe, and Glenn Three Stars and Bennie "Tote" Richards, two other members of the Tribe.

The dispute leading to the civil action arose during the Tribal General Election campaign of January and February, 1974 between respondent Means and petitioner Wilson, which culminated in Wilson's reelection on February 7, 1974. The amended complaint alleged that petitioners, other named defendants, and others not named in the complaint conspired to commit election

irregularities and to intimidate opponents of President Wilson.

The District Court dismissed the respondents' complaint for failure to state a claim on which relief could be granted. That Court also stated that it lacked jurisdiction over the subject matter.

The Court of Appeals affirmed in large part but reversed on two grounds, on one of them unanimously and on another by a divided court. The issue on which the court divided and which is the only issue raised in this petition was put by the majority in the following words:

> The complaint states that defendants conspired and did overt acts in furtherance of a conspiracy to deprive plaintiffs of their right to vote because they were supporters of plaintiff Means and members of the American Indian Movement.
>
> * * * * *
>
> The group of Plaintiffs in this case, by their affirmative acts of supporting plaintiff Means and the American Indian Movement and attempting to oust Wilson as their Council President, were a class against whom, according to the allegations of their complaint, the defendants discriminated because of their class membership. This brings their complaint within the ambit of 42 U.S.C. Sec. 1985(3). [Footnote omitted.] [Appendix A, pp. 8a-10a.]

The Court of Appeals also found that a claim had been stated, under the Indian Civil Rights Act, 25 U.S.C. Sec. 1302, against the Tribal Elections Board for allegedly deliberately failing to provide proper instructions to other election officials with the intent to insure the success of other alleged illegal activities carried out by Wilson and his supporters. Review of that latter portion of the Court of Appeals decision is not sought by petitioners.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW RAISES IMPORTANT AND CONTINUING PROBLEMS RELATING TO ABUSE IN THE INVOCATION OF 42 U.S.C. SEC. 1985(3).

The Eighth Circuit's opinion in this case reflects one possible resolution of the crucial questions left unanswered by the Supreme Court in *Griffin v. Breckenridge*, 403 U.S. 88 (1971) concerning the scope of 42 U.S.C. Sec. 1985(3). The statutory provision, the construction of which is in issue herein, formed a portion of the Civil Rights Act of 1871. In *Griffin*, this Court made clear that the statute prohibited certain private conspiracies as well as those involving state action or participation. However, this Court took some pains to point out that not *every* tortious conspiratorial interference with the rights of others gave rise to a cause of action under Sec. 1985(3). The Court said of that provision:

> The language requiring intent to deprive of *equal* protection or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.[9]
>
> [9] We need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of Sec. 1985(3) before us. . . .

Griffin v. Breckenridge, supra, 403 U.S. at 102.

The Court concluded its *Griffin* opinion by pointing out that, since the factual situation alleged therein was so near the "core" of Sec. 1985(3), that is, discrimination against Black persons because of their race, no attempt

had been made in the decision to illuminate the outer boundaries of the provision's scope.

In its ruling in this case, the majority cited as support the holding of the Sixth Circuit in *Cameron v. Brock*, 473 F.2d 608, 610 (6th Cir. 1973) that "Sec. 1985(3)'s protection reaches clearly defined classes, such as supporters of a political candidate." *Cameron* involved alleged violations of the plaintiff's rights by a sheriff and his deputies when the plaintiff attempted to distribute pamphlets supporting the sheriff's election opponent. Similarly, the Sixth Circuit has also found that a conspiracy motivated by an invidiously discriminatory animus directed at persons carrying signs critical of the President would give rise to a cause of action under Sec. 1985(3). *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975). The Sixth Circuit also apparently concluded, without specific discussion of the issue of the class against which the requisite discriminatory animus was directed, that a family could constitute a sufficient class. *Azar v. Conley*, 456 F.2d 1386 (6th Cir. 1972). In *Azar* there was no racial animus alleged; apparently the defendants there were simply alleged not to like plaintiffs and to have conspired to harass them.[1]

The dissenter below, Judge Webster, was not prepared to go along with the rulings of the Sixth Circuit:

> I cannot agree that supporters of a particular candidate form a sufficiently discrete class upon which to predicate federal jurisdiction under 42 U.S.C. Sec. 1985(3). Race is not involved in this

---

[1]Similarly, a family was the class allegedly discriminated against in *Harrison v. Brooks*, 446 F.2d 404 (1st Cir. 1971). However, the court in *Harrison* did not discuss an invidiously discriminatory animus and did not cite *Griffin v. Breckenridge*, which had been handed down only a few weeks before.

contest; Indian supporters of one group of political candidates bring this action against Indian supporters of another. The holding in Part II of the majority opinion permits a non-insular, mutable, amorphous group to satisfy the alternative requirement in *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971), that "there must be some racial, or perhaps *otherwise class-based*, invidiously discriminatory animus behind the conspirators' action." (Emphasis added.)

Taken to its local extension this holding grants federal jurisdiction to any group of supporters of a local candidate who claim they were purposefully victimized by their opponents in state or local elections. Thus is introduced in our system a "general federal tort law" feared by Justice Stewart, author of *Griffin*, 403 U.S. at 102. [Appendix A, p. 15a.]

One of the best indicators of the difficulty which most of the Courts of Appeals are having with the issue of Sec. 1985(3)'s scope is the lengths to which they have gone to avoid rendering an opinion on it. For example, in interpreting the class-based discriminatory test of *Griffin*, a majority of a panel of the Fifth Circuit held:

> There need not necessarily be an organizational structure of adherents, but there must exist an identifiable body with which the particular plaintiff associated himself by some affirmative act. It need not be an oath of fealty; it need not be an initiation rite; but at least it must have an intellectual nexus which has somehow been communicated to, among and by the members of the group. *Westberry v. Gilman Paper Co.*, 507 F.2d 206, 215 (5th Cir. 1975).

But when the court reheard the case, this time sitting *en banc*, the three-judge panel opinion was withdrawn "so that it [would] spawn no legal precedents" and the cause was found to be moot. *Id.*, 507 F.2d at 216. The only logical explanation for this action on the part of the Fifth Circuit, particularly in light of the fact that the dissenter on the original panel objected to the panel majority's opinion on the single ground that it turned 42 U.S.C. Sec. 1985(3) into a "general federal tort law," is that there was a deep division within that Court as to the statute's scope. Had the majority of the court been willing to accept the panel majority's conclusion on the statute's scope, the case could merely have been remanded with directions to dismiss it as moot but without withdrawing the original opinion and without specifically expressing the intent that no precedent spring therefrom. See also *Jacobs v. Industrial Foundation of the Permian Basin*, 456 F.2d 259 (5th Cir. 1972) in which the Fifth Circuit also circumvented the "class" issue.

A somewhat similar attempt to avoid dealing with the issue of what constitutes a proper class for Sec. 1985(3) purposes appears in *Arnold v. Tiffany*, 487 F.2d 216 (9th Cir. 1973), *cert. denied*, 415 U.S. 984 (1974). There, the District Court had dismissed the plaintiffs' complaint, holding that *Griffin's* use of the phrase "class-based, invidiously discriminatory animus" had reference only "to that kind of irrational and odious class discrimination akin to racial bias—such as discrimination based on national origin or religion." *Arnold v. Tiffany*, 359 F. Supp. 1034, 1036 (C.D. Cal. 1973). The class allegedly discriminated against in *Arnold* was the *Los Angeles Times* newspaper dealers. The Court of Appeals affirmed the District Court's dismissal, but on the ground that the *Arnold* plaintiffs had not alleged injury because of their

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v. Gannon, 450 F.2d 1227 (8th Cir. 1971) concerning the necessity of "state action" or "state involvement" where the class allegedly discriminated against was other than Black persons. As the original panel indicated in *Westberry, supra*, 507 F.2d at 210, "There is no precedential lighthouse pointing us to a constitutional mooring in this case."

Even the Eighth Circuit, prior to ruling in the instant case, has shown its hesitancy to confront the "class" issue head on. In *Baker v. Stuart Broadcasting Company*, 505 F.2d 181 (8th Cir. 1974), the plaintiff had alleged a private conspiracy not to hire her because of her sex. The District Court ruled that Sec. 1985(3) did not reach beyond racially motivated conspiracies, a position in accord with the law review commentators. See "Note, Federal Civil Remedy Encompassing Private Conduct in Civil Rights Violence," 46 *Tulane L. Rev.* 822 (1971). The Eighth Circuit avoided the issue by holding that no conspiracy could exist between a corporation and its officers since only one "person" was involved. *Accord, Dombrowski v. Dowling, supra.*

Thus if this Court were to make clear whether Sec. 1985(3) has its "constitutional mooring" in the Fourteenth Amendment as well as the Thirteenth, something it specifically declined to do in *Griffin*, 403 U.S. at 107, it would do much to aid the various Circuits in dealing with Sec. 1985(3) complaints. But in the absence of rulings from this Court on both that issue and on what "classes" Sec. 1985(3) is intended to protect, the issue presented here, the lower courts are doubly hampered.

II.

THE DECISION BELOW CONFLICTS WITH STATEMENTS OF ANOTHER COURT OF APPEALS AND WITH A DECISION OF THIS COURT AS TO THE PROPER INTERPRETATION OF 42 U.S.C. SEC. 1985(3).

The majority opinion below, over the dissent of Judge Webster, brings the Eighth Circuit into accord with the Sixth Circuit concerning the types of classes the members and advocates of which are protected by Sec. 1985(3). *Cameron v. Brock, supra.* Although none of the other Courts of Appeals have yet specifically held that the supporters of a political candidate are *not* a class protected by Sec. 1985(3), there is good reason to believe that at least the First Circuit would so hold if given the opportunity.

In *Bricker v. Crane,* 468 F.2d 1228 (1st Cir. 1972), *cert. denied,* 470 U.S. 930 (1973), the plaintiff would have alleged, had he been permitted to amend his complaint, that he was a member of a class of physicians who had been discriminated against because of their testimony in malpractice cases. The First Circuit held that this additional allegation would not have helped the complaint withstand dismissal since the existence of the class was not supported by factual allegations. In the supporting language of its decision, the Court noted:

> In the instant case, however, appellant has done no more than flatly assert his membership in a novel class which is *neither readily recognizable nor among those traditionally protected by the Civil Rights Act.* (Emphasis supplied) *Id.*, 468 F.2d at 1233.

The language is significant because it implies that only those types of classes described by the First Circuit are considered by it to qualify for protection under Sec.

1985(3). Quite obviously, the supporters of a c
for public office do not constitute a class "trad
protected" by the Civil Rights Act, nor a
supporters so immutably attached to their candid
constitute a "readily recognizable" class.

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It was with the teachings of *Bricker* in mind th
held that a plaintiff, who was the former Re
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that he was chosen for harm by the defendants
of his "militant republicanism," had not m
necessary allegation of class-based invidiously dis
tory animus for a Sec. 1985(3) claim. *Hahn v.*
388 F. Supp. 445 (D. Mass. 1975).

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It has also been held that *Griffin* requires
protected class be one which is traditionally "s
Bellamy v. Mason's Stores Inc., 368 F. Sup
(E.D.Va. 1973), *aff'd on other grounds*, 508 F
(4th Cir. 1974). In *Bellamy*, the District Court
Sec. 1985(3) as requiring a protected class to
"discrete, insular and immutable characteristics c
ble to those characterizing classes such as race,
origin and sex" and held that a distinction
drawn between a political organization and a
similar class. 368 F. Supp. at 1028. The District
Baker, supra, took an even more restrictive vie
classes protected by Sec. 1985(3). See also Fw
"The Motion Picture Rating System of 1968: A
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73 *Col. L. Rev.* 185, 238-239, indicating t
1985(3) could probably not be expanded to pro
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More importantly, the decision below is not in accord with the continuing validity of this Court's opinion in *Collins v. Hardyman*, 341 U.S. 651 (1950).[2] In *Collins*, the plaintiffs, members of a political club, had organized a meeting to petition the Government for the redress of their grievances. They alleged that the defendants conspired to attend the meeting and break it up with threats and violence because defendants opposed their political views. The Court described the essence of the complaint in *Collins* as "... a case of a lawless political brawl, precipitated by a handful of white citizens against other white citizens." 341 U.S. at 662. The Court held the complaint correctly dismissed.

The allegations in the instant case are much closer to these in *Collins* than in *Griffin*. What is alleged here is that one group of Indians threatened, did violence to, and generally harassed another group of Indians of the same tribe because of the latter's support of a particular candidate for Tribal President and their opposition to another candidate. The sole question which petitioners seek to bring before this Court is whether such an amorphous political group is a protected class under Sec. 1985(3).

As this Court recognized in *Griffin*, the requirement of an invidiously discriminatory motivation is the only attribute which keeps Sec. 1985(3) from becoming a general federal tort law. Certainly the provision's draftsmen had no broader intent. The most expansive interpretation of the legislation, that by Senator Edmunds cited

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[2]It is important to note that *Collins* was *not overruled* by *Griffin*. The Court in *Griffin* made it clear that it was expressing no opinion as to the correctness of *Collins on its own facts*. 403 U.S. at 95.

in the Court's *Griffin* opinion, mentioned only such clear-cut classes as Catholics, Methodists, and Vermonters (Cong. Globe, 42d Cong., 1st Sess. 567 (1871)) as classes protected by the statute. No such formless and ever-changing classes as political supporters were discussed by the draftsmen. One does not need a particularly vivid imagination to recognize the burden on the Federal courts which would result if every purported supporter of a candidate challenging an incumbent in, for example, a state-wide election could devise a complaint capable of surviving a motion to dismiss merely by alleging that any adverse action taken *by any person* against him was part of a conspiracy and due to his political position. Most surely, the decision below brings the "political brawl" within the scope of Sec. 1985(3). Little wonder, then, that Judge Webster objected to that decision as the creation of a general federal tort law. The failure of the Eighth Circuit to heed the remaining teachings of *Collins*, the precedent it has set for broadening the sweep of federal protection under Sec. 1985(3), and the lack of clarity on this issue in the decision of the lower Federal courts justify the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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Counsel for Petitioners

November 3, 1975

CERTIFICATE OF SERVICE

I hereby certify that on this ~~3rd~~ 26th day of November, 1975, three copies of the Petition for Writ of Certiorari were mailed, air mail, postage prepaid, to Steven J. Trecker, Esq., 17 Bulkley #3, Sausalito, California 94965, Counsel for the Respondents. I further certify that all parties required to be served have been served.

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Counsel for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1841

Russell Means, et al.,
Appellants,

v.

Dick Wilson, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA, WESTERN DIVISION

Submitted: May 12, 1975
Filed: August 5, 1975

Before LAY, ROSS and WEBSTER, Circuit Judges.

ROSS, Circuit Judge.

This is an appeal from the dismissal of a complaint which grew out of an Indian election dispute in the District of South Dakota. The facts are set out fully in the district court opinion. *Means v. Wilson*, 383 F.Supp. 378 (D.S.D. 1974). Appellants, who were plaintiffs below, are Russell Means, an unsuccessful candidate for president of the Oglala Sioux Tribal Council in the February, 1974 election, and a group of his political supporters. They are all enrolled members of the Oglala Sioux Tribe residing on the Pine Ridge Indian Reservation in South Dakota. The appellees are Richard "Dick"

Wilson, who was elected president of the Council in the aforementioned election, a number of tribe members who supported him, the Tribal Council and certain members thereof and the Tribal Election Board. Some of the appellants are sued individually and in their capacities as officials of the Tribe. They are also enrolled Oglala Sioux, residents of Pine Ridge Reservation.[1]

The action was brought under 28 U.S.C. §1343,[2] the Indian Civil Rights Act (25 U.S.C. §§1301-1303) and 42

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[1]The original complaint named as additional defendants the U.S. Department of the Interior, the Bureau of Indian Affairs, the Commissioner of Indian Affairs and the Department of Justice. These defendants were deleted from the amended complaint, although plaintiffs allege participation by federal officers and agencies in the conspiracy which is the basis of their action.

[2]28 U.S.C. §1343 provides:

> The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy in section 1985 of Title 42;
>
> . . . .
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Section 1343(4) gives the courts jurisdiction to redress violations of the substantive rights set forth in the Indian Bill of Rights, 25 U.S.C. §1301 *et seq. Luxon v. Rosebud Sioux Tribe*, 455 F.2d 698, 700 (1972).

Since a violation of substantive law is a condition precedent to assumption of jurisdiction under section 1343(1) or (4), for the sake of brevity we will refer to the issue of whether there is jurisdiction under 42 U.S.C. §1985(3) or 25 U.S.C. §1302, even though 28 U.S.C. §1343 is the statute which actually gives the court jurisdiction to redress violations of the substantive statutes named.

U.S.C. §§1985(3), 1986 and 1988. The district court found that there was no jurisdiction given by either 42 U.S.C. §1985 or 25 U.S.C. §1302, but rested its decision on the section 1302 claim on the determination that no claim was alleged under that section. We agree with the court below except in certain respects mentioned herein, and affirm in part and reverse in part.

I. Exhaustion of Tribal Remedies.

Although the trial court did not rely on its conclusion that the Means supporters failed to exhaust tribal remedies in dismissing their complaint, it found that there was such a failure and that this also would have barred plaintiffs from maintaining an action under 25 U.S.C. §1302 for lack of jurisdiction. We express no view of whether exhaustion of tribal remedies is a prerequisite to federal relief under the Indian Civil Rights Act or 42 U.S.C. §1985(3) in this particular case, because we find that the plaintiffs made every reasonable attempt to exhaust their tribal remedies.

Plaintiffs originally filed suit on February 11, 1974. On February 19, 1974, plaintiffs moved for a continuance in order to allow them to pursue a formal election contest filed on February 15 in accordance with Tribal Ordinance 85G. Section 12 of the ordinance provides that election contests shall be filed with the election board within three days of certification of the election. The election was certified on February 13, 1974, and one of the plaintiffs, on behalf of Means and all other tribe members, filed a formal contest with a member of the election board at 8:00 p.m. on February 15. The election board is required to act on the contest and make recommendations thereon to the Tribal Council within five days after the contest is filed. Apparently the board

denied relief on February 20, 1974. Within five days after the election board has made its determination, Ordinance 85G requires the Tribal Council to render a decision on the contest. The ordinance provides that: "The decision of the Council on a contest shall be final." However, the Council did not issue a decision on the plaintiffs' election contest within five days and has still not ruled on the contest. Plaintiffs waited for a final decision on the contest until March 29, 1974, before filing their amended complaint, over a month after the Tribal Council, headed by defendant Wilson, had failed to meet the five day deadline imposed by Tribal Ordinance 85G. We find that plaintiffs have done all they could to exhaust tribal remedies in this case, but their tribal right to appeal the election has been frustrated by inaction of the Tribal Council. "The plaintiffs sought relief [through tribal channels] and were denied an effective timely remedy." *Brown v. United States,* 486 F.2d 658, 661 (8th Cir. 1973).

II. 42 U.S.C. §1985(3).[3]

In considering the Means faction's section 1985(3) claim, the district court first held that that section did

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[3]42 U.S.C. §1985(3)

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory

[footnote continued]

not affect the Oglala Sioux Tribe's historic immunity from suit. With this we agree. *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe,* 370 F.2d 529, 531-532 (8th Cir. 1967); *Native American Church v. Navajo Tribal Council,* 272 F.2d 131, 134-135 (10th Cir. 1959). But the district court erred in concluding that this same reasoning applied to suits against individual Indians. Tribal immunity is based on the sovereignty of the tribe, *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559 (1832), and does not protect a tribal subject from suit. *Seneca Constitutional Rights Organization v. George,* 348 F.Supp. 48, 49 (W.D.N.Y. 1972). Therefore we must look further than the tribal immunity doctrine to determine whether there is jurisdiction over individual defendants under 42 U.S.C. §1985(3) and 28 U.S.C. §1343(4).

In *Griffin v. Breckenridge,* 403 U.S. 88, 101-102 (1971), the Court held that 42 U.S.C. §1985(3) provided

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the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

a cause of action against private conspiracies, i.e. those not involving state action, to deprive citizens of equal protection of the law or of equal privileges and immunities. In each section 1985 case it must be determined whether there is a constitutional source of congressional power to reach the private conspiracy alleged in the complaint. *Griffin v. Breckenridge, supra,* 403 U.S. at 104; *Action v. Gannon,* 450 F.2d 1227, 1233 (8th Cir. 1971). In *Griffin* the Supreme Court identified two such sources of congressional power; the thirteenth amendment and the right of interstate travel. *Supra,* 403 U.S. at 105-106. This latter right was characterized as one of the rights of national citizenship which Congress has the power to protect by appropriate legislation. *Supra,* 403 U.S. at 106. In this context several cases were cited as exemplary of other "rights of national citizenship;" among them were *United States v. Classic,* 313 U.S. 299, 314-315 (1941) and *Ex Parte Yarbrough,* 110 U.S. 651, 658-662 (1884). *Classic* and *Yarbrough* were both prosecutions under criminal statutes analogous to 42 U.S.C. §1985(3), based on alleged interference with voting rights in *national* elections. It is thus apparent that the right to vote in federal elections is a right of national citizenship protected from conspiratorial interference by 42 U.S.C. §1985(3). *Griffin v. Breckenridge, supra,* 403 U.S. at 106. The Sixth Circuit has held, and we agree, that the right to cast a ballot in a state election is also protected from interference from private conspiracies by the federal Constitution. *Cameron v. Brock,* 473 F.2d 608, 610 (6th Cir. 1973); *see also Reynolds v. Sims,* 377 U.S. 533, 554 (1964); *Smith v. Cherry,* 489 F.2d 1098, 1100-1101 (7th Cir. 1973).

The right to vote is fundamental to representative government. As a right of national citizenship, it is a

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[4] "The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes. . . ." U.S. CONST. ART. I, §8.

June 2, 1924, ch. 233, 43 Stat. 253; *Iron Crow v. Oglala Sioux Tribe,* 231 F.2d 89, 97 (8th Cir. 1956). At that time certainly, if not before, Indians became endowed with the fundamental rights of national citizenship, including the right to vote. FEDERAL INDIAN LAW, 530.

The Pine Ridge Reservation, the tribal constitution which sets forth election procedures and the organization of the Oglala Sioux Tribe all exist pursuant to federal law, Act of Mar. 2, 1889, ch. 405, §1, 25 Stat. 888; 25 U.S.C. §§476, 477; *see Iron Crow v. Ogallala Sioux Tribe,* 129 F.Supp. 15, 18-20 (D.S.D. 1955), *aff'd,* 231 F.2d 89 (8th Cir. 1956). The Oglala Sioux have established their system of representative government under the authority of these statutes, which in turn were enacted by Congress under the authority contained in the Indian Commerce Clause. In this way Congress has encouraged the development of democratic processes for the self-government of the Oglala Sioux, and extended to them the benefits of national citizenship. Since the right to vote in a system of representative government is one of the essential trappings of citizenship protected by the Constitution, we hold that Congress has necessarily granted it to the plaintiffs, and in a proper case, interference with the right to vote in a tribal election may be vindicated under 42 U.S.C. §1985(3) as a deprivation of equal protection of the laws or equal privileges and immunities under the law.

The plaintiffs in this case have thus alleged facts to bring this case and some of the defendants within the jurisdiction of the federal courts. The complaint states that defendants conspired and did overt acts in furtherance of a conspiracy to deprive the plaintiffs of their right to vote because they were supporters of plaintiff

Means and members of the American Indian Movement. In *Griffin* the court emphasized that in order to show a deprivation of equal protection or equal privileges and immunities which may be redressed under 42 U.S.C. §1985(3), it must be shown that the conspirators were motivated by an invidiously discriminatory animus toward a racial group or perhaps another type of class. *Supra*, 403 U.S. at 102. In interpreting this class-based discrimination test the Fifth Circuit has said:

> There need not necessarily be an organizational structure of adherents, but there must exist an identifiable body with which the particular plaintiff associated himself by some affirmative act. It need not be an oath of fealty; it need not be an initiation rite; but at least it must have an intellectual nexus which has somehow been communicated to, among and by the members of the group.

Westberry v. Gilman Paper Co., 507 F.2d 206, 215 (5th Cir. 1975). This opinion was later withdrawn by the Fifth Circuit sitting en banc and the cause remanded with directions to dismiss it as moot, "so that it will spawn no legal precedents." *Supra*, 507 F.2d at 216. However, in our opinion, the reasoning above quoted was and is valid in the light of *Griffin*. The group of plaintiffs in this case, by their affirmative acts of supporting plaintiff Means and the American Indian Movement and attempting to oust Wilson as their Council President, were a class against whom, according to the allegations of their complaint, the defendants discriminated because of their class membership.[5] This brings their complaint within the

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[5]This case differs from those in which there was not a clearly defined class, *e.g.*, *Ward v. St. Anthony Hosp.*, 476 F.2d 671, 676 (10th Cir. 1973); *Bricker v. Crane*, 468 F.2d 1228, 1233 (1st Cir.

[footnote continued]

ambit of 42 U.S.C. §1985(3). *Cameron v. Bro*ck, 473 F.2d 608, 610 (6th Cir. 1973). We must now exa*mine the* complaint more closely to determine whether it states a claim under the statute as to any of the named defendants.

Under FED. R. CIV. P. 8, technical niceties of pleading are not required. Rather, a short and plain sum*mary of* the facts sufficient to give fair notice of th*e claim* asserted is sufficient. *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Many of the plaintiffs' allegations fail to meet this test. At a minimum, the complaint must sta*te some* way in which the named defendants participate*d in the*

1972), *cert. denied*, 410 U.S. 930 (1973), or those in wh*ich there* was a class, but the alleged conspiratorial discriminatio*n was not* *motivated by* plaintiffs' class membership. *E.g., Arnold v Tiffany*, 487 F.2d 216, 218 (9th Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); *Hughes v. Ranger Fuel Corp.*, 467 F.2d 6, 10 (4th Cir. 1972). 42 U.S.C. §1985(3) does not reach every injury s*uffered by* an individual; that would be tantamount to a general fe*deral tort* law, which Congress does not have the power to enact.

> The constitutional shoals that would lie in the path of interpeting §1985(3) as a general federal tort law can be avoided . . . by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. . . . The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (footnotes omitted). In this case, where the complaint alleges a conspiracy motivated by intent to deprive plaintiffs *qua* Means supporters of their right to vote, the "constitutional shoals" of interpeting the statute as a general federal tort law have been circumnavigated.

alleged conspiracy to take away the election rights of the plaintiffs. *Smallwood v. United States,* 358 F.Supp. 398, 408 (E.D. Mo.), *aff'd mem.,* 486 F.2d 1407 (8th Cir. 1973); *see Ellingburg v. King,* 490 F.2d 1270, 1271 (8th Cir. 1974). In addition a complaint under 42 U.S.C. §1985(3) must allege facts to show that intentional or invidious discrimination was the object of the conspiracy. *Griffin v. Breckenridge, supra,* 403 U.S. at 102-103; *Snowden v. Hughes,* 321 U.S. 1, 7, 10 (1944).

Most of the allegations against defendants as individuals either fail to identify any of the named defendants as a conspirator or fail to allege the required animus. The only possible adequate allegation of a conspiracy under 42 U.S.C. §1985(3) which appears in the complaint is that defendant Wilson conspired with private individuals to insure his reelection by illegal means, and in furtherance of this conspiracy a private, unauthorized police force known as the "Goon Squad," was maintained by Wilson which harassed and threatened those who opposed the Wilson administration. Defendant Glenn Three Stars is identified as leader of the force and another defendant, Bennie "Tote" Richards, is alleged to be a member. As to these two defendants and defendant Richard "Dick" Wilson we hold that the complaint very inartfully states a claim under 42 U.S.C. §1985(3).

III. The Indian Civil Rights Act.

We agree with the district court's conclusion that 25 U.S.C. §1302[6] provides rights only against the tribe and

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[6]The specific provision with which we are concerned here is 25 U.S.C. §1302(8):

> 25 U.S.C. §1302. *Constitutional Rights*
>
> No Indian tribe in exercising powers of self-government shall——
>
> . . . .

[footnote continued]

governmental subdivisions thereof, and not against tribe members acting in their individual capacities. *Spotted Eagle v. Blackfeet Tribe,* 301 F.Supp. 85, 89-90 (D. Mont. 1969). The statute provides that: "No Indian tribe in exercising powers of self-government shall . . ." engage in the prohibited conduct. 25 U.S.C. §1302. "Indian tribe" and "powers of self-government" are defined in 25 U.S.C. §1301(1) and (2).[7] When sections 1301 and 1302 are read together it is plain that only actions of the tribe and tribal bodies are constrained.

To some extent then, the historic immunity from suit has been abrogated by the Indian Civil Rights Act. *Daly v. United States,* 483 F.2d 700, 705 (8th Cir. 1973); *Luxon v. Rosebud Sioux Tribe,* 455 F.2d 698, 700 (8th Cir. 1972). Therefore, even though tribal immunity prevents suit against the tribe or its governmental arms under 42 U.S.C. §1985(3), the Means supporters can still sue these bodies under 25 U.S.C. §1302.

Subsection 8 of 25 U.S.C. §1302 is modeled closely after the equal protection clause of the federal Constitu-

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(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law. . . .

[7]25 U.S.C. §1301. *Definitions*

For purposes of this subchapter, the term——

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses. . . .

tion. Federal courts have refused to decide election contests based on equal protection arguments in the absence of allegations of intentional deprivation of the right to vote. *See Snowden v. Hughes,* 321 U.S. 1, 11 (1944); *Smith v. Cherry,* 489 F.2d 1098, 1102-1103 (7th Cir. 1974); *Cameron v. Brock,* 473 F.2d 608, 610 (6th Cir. 1973). Thus, in *Pettengill v. Putnam County R-1 School District,* 472 F.2d 121, 122 (8th Cir. 1973) we refused to decide a school bond election contest based on a contention that administrative errors had diluted plaintiffs' votes.

The district court correctly concluded that the standard for setting aside a tribal election must be at least as restrictive as that applied in non-Indian local election cases under the Constitution. We agree that there are no allegations of fact in the complaint to show that the Oglala Sioux Tribe or the Tribal Council has intentionally deprived Means supporters of equal protection of the law, nor that they have attempted to do so.

We note, however, that a claim of intentional interference with plaintiffs' voting rights is stated against the Tribal Election Board. Numerous election errors and irregularities allegedly affected the result of the election. In addition, the complaint states: "The three-person Election Board failed to provide proper instructions to election judges and clerks in a deliberate attempt to confuse the situation to insure the success of the illegal practices." This is alleged to be part of a conspiracy between Wilson and "other tribal officers" to insure Wilson's election. Although it seems to us that such an allegation would be difficult to prove, it would be sufficient to state a claim for denial of equal protection if this were alleged against a local government in a non-Indian case.

Additional considerations of the desirability of preservation of unique tribal cultures and continued vitality of tribal governments underlie the Indian Civil Rights Act, however, and these considerations counsel great caution in applying traditional constitutional principles to Indian tribal governments. *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1144 (8th Cir. 1973); Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1368 (1969). In this case, the alleged interference with plaintiffs' voting rights is not founded in tribal custom or governmental purpose which would justify modification of traditional equal protection concepts. Rather, the complaint alleges an intentional interference by the Election Board with tribal members' rights to participate in their government, which are granted them by the Oglala Sioux Constitution. We believe this alleged violation falls within the protection of 25 U.S.C. §1302(8), and the Election Board is an "Indian tribe" exercising powers of self-government as defined by 25 U.S.C. §1301(1) and (2). Therefore it was error to dismiss the complaint against the defendant, the Oglala Sioux Tribe Election Board.

The order of the district court is reversed with respect to dismissal of the complaint against Richard "Dick" Wilson, Glenn Three Stars, Bennie "Tote" Richards, and the Oglala Sioux Election Board; dismissal of the complaint against the other defendants is affirmed. The case is remanded to the district court for further proceedings consistent with this opinion.

WEBSTER, Circuit Judge, concurring in part and dissenting in part.

I concur in Parts I and III of the opinion, but I respectfully dissent from the holding in Part II.

I cannot agree that supporters of a particular candidate form a sufficiently discrete class upon which to predicate federal jurisdiction under 42 U.S.C. §1985(3). Race is not involved in this contest; Indian supporters of one group of political candidates bring this action against Indian supporters of another. The holding in Part II of the majority opinion permits a non-insular, mutable, amorphous group to satisfy the alternative requirement in *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971), that "there must be some racial, or perhaps *otherwise class-based*, invidiously discriminatory animus behind the conspirators' action." (Emphasis added.)

Taken to its local extension this holding grants federal jurisdiction to any group of supporters of a local candidate who claim they were purposefully victimized by their opponents in state or local elections. Thus is introduced into our system a "general federal tort law" feared by Justice Stewart, author of *Griffin*, 403 U.S. at 102.

APPENDIX B

[378] **Russell MEANS et al.**
v.
Dick WILSON et al.
No. CIV 74-5010.

United States District Court,
D. South Dakota.
Sept. 20, 1974.

* * *

[380] Stephen L. Pevar, Mission, S. D., Steven Trecker, Sioux Falls, S. D., for plaintiffs.

Dennis H. Hill, Rapid City, S. D., for defendants.

MEMORANDUM OPINION

BOGUE, District Judge.

Twenty-eight plaintiffs, American Indians and residents of the Pine Ridge Indian Reservation, brought this action to set aside the Oglala Sioux Tribal election held on February 7, 1974. The plaintiffs claim that certain alleged election irregularities deprived them of their right to a fundamentally fair election. The plaintiffs further claim that various fraudulent and criminal acts alleged to have been committed by the defendants during the election period violated their right to vote. The plaintiffs' claims, therefore, can be divided into two categories: (1) alleged administrative election irregularities, and (2) alleged fraudulent conduct in supervising the election.

The plaintiffs urge their cause of action under 18 U.S.C.A. §§ 241, 245; 42 U.S.C.A. §§ 1985(3), 1986, 1988; and under 25 U.S.C.A. §§ 1301, 1302, 1303, the Indian Civil Rights Act of 1968.

The United States Department of the Interior, the Bureau of Indian Affairs, the Commissioner of Indian Affairs, the Department of Justice, and the Judges of the Oglala Sioux Tribal Government were named in the original complaint as defendants but were dismissed by the plaintiffs on March 29, 1974, and now are not parties to this litigation. The remaining defendants in this case are all American Indians and residents of the Pine Ridge Indian Reservation. Twenty of the defendants are named parties both as individuals, and in their official capacity as officers and employees of the Oglala Sioux Tribe, and other defendants are named parties solely as individuals.

The plaintiffs request injunctive relief to prevent the tampering with or the destruction of official election ballots, voter registration lists, and affidavits of residency used during the February 7th election. The plaintiffs request injunctive relief to prevent candidates certified by the Election Board as elected in the February 7th election from being inaugurated into office, and they also request injunctive relief to prevent the defendants, who would continue to hold office if newly-elected officials were prevented from taking office, from exercising all governmental authority except authority to perform ministerial functions necessary for day to day manage-

ment of tribal affairs. The plaintiffs further request that this Court declare the February 7th election to be null and void and order the Tribal Council to
[381] conduct a new election. In addition to the relief prayed for above, the plaintiffs request an award of $15,000.00 in actual and punitive damages to compensate for alleged violations of their civil rights.

Upon motion, order to show cause, and hearing this Court granted a Temporary Restraining Order on February 11, 1974, to prevent the tampering with or the destruction of the February 7th election documents. On February 13, 1974, this Court ordered the United States Marshal's Service to take protective custody of the election documents. A hearing was held on April 4, 1974, upon the plaintiffs' motion to enjoin the installation of officers and officials elected at the February 7th election, and good cause having been shown, this Court denied the motion and allowed the newly-elected officials to continue to function as the new Oglala Sioux Tribal Government. The plaintiffs were allowed to amend their complaint twice, the defendants answered the complaint on May 11, 1974, and a pretrial was held on July 8, 1974. Pursuant to stipulation between all parties to this case, that the documentary evidence be presented to the Court in a bifurcated trial, the trial commenced on July 15, 1974.

On May 11, 1974, the defendants moved this Court, pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure, to dismiss the complaint for failure to state a claim upon which re-

lief can be granted. This motion is now before the Court for consideration. In considering this motion, matters that have been presented outside the pleadings are excluded by the Court. Fed.R. Civ.P. 12(b).

In accordance with Rule 12(h)(3) of the Federal Rules of Civil Procedure, that "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action," this Court of its own motion and upon defendants' urging that this case does not come within the applicable grant of statutory authority, recessed the trial on July 17, 1974, and moved to dismiss for lack of subject matter jurisdiction. A briefing schedule was set on both pending motions, and on September 3rd, the final reply brief was submitted to the Court.

[1–4] In considering the motion to dismiss for lack of subject matter jurisdiction we must keep in mind the important principle that federal courts are courts of limited jurisdiction. The federal courts are empowered to hear only such cases as are within the judicial power of the United States, as defined by the United States Constitution, and only those cases that have been entrusted to them by a jurisdictional grant by Congress. The rule is well settled that the party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is within the competence of the Court and the presumption is that the Court lacks jurisdiction in a

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matter exists, Wright and M
Practice and Procedure, as been demon-
Turner v. President, Direc over the subject
pany of the Bank of Nor Miller, Federal
Dall. 8, 1 L.Ed. 718 (1799) section 1206;
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456, 46 S.Ct. 338, 70 L.Ed se the existence
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Cir. 1968); Joyce v. Unit ough, 270 U.S.
F.2d 215 (3rd Cir. 1973 d. 682 (1926);
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Sand & Gravel Co., 469 rden is on the
Cir. 1972). When the q xistence. Rose-
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that are involved in the F.2d 416 (5th
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and determine the issue, a the same facts
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73, 425 F.2d 504 (1970). as it always has
its jurisdiction.

[382] [5] The defendants c 3 U.S.App.D.C.
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gress. United States v. United States F. & G. Co., 309 U.S. 506, 512, 60 S.Ct. 653, 84 L.Ed. 894 (1940); Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529, 532 (8th Cir. 1967). The immunity may not be evaded by suing tribal officers. Adams v. Murphy, 165 F. 304 (8th Cir. 1908); Haile v. Saunoke, 246 F.2d 293 (4th Cir. 1957).

[6] The facts alleged and the plaintiffs' claims under 18 U.S.C.A. §§ 241 and 245, and 42 U.S.C.A. §§ 1985, 1986, 1988 do not provide this Court with a proper jurisdictional base. The plaintiffs allege violations of their civil rights but do not claim any discrimination because of race. This is a civil suit. It is also clear that plaintiffs' claim is concerned only with civil rights of Indians in their relationships with the Indian tribe, officers of the tribe, and with other individual Indians. It is not concerned with Indians in their relationship to whites or to the state or federal governments.

The plaintiffs' claims under 18 U.S.C.A. §§ 241 and 245 border on the frivolous and are completely without merit. This section provides criminal sanctions for violations of civil rights laws. 18 U.S.C.A. §§ 241 and 245 create no civil liability. Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965); Spotted Eagle v. Blackfeet Tribe of the Blackfeet Indian Reservation, 301 F.Supp. 85 (D.C. 1969).

The plaintiffs' claims under 42 U.S.C.A. §§ 1985, 1986 and 1988 are also without merit and fail to provide this

Court with a proper jurisdictional base. In Spotted Eagle v. Blackfeet Tribe of Blackfeet Indian Reservation, 301 F. Supp. 85 (1969), the Court after careful review of the legislative history, held that 42 U.S.C.A. § 1985 does not provide any rights to the Indian in his relationship with his tribal government. Citing Elk v. Wilkins, 112 U.S. 94, 5 S.Ct. 41, 28 L.Ed. 643 (1884), and Collins v. Hardyman, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253 (1951), the Court concluded that § 1985 was a post Civil War measure concerned with the rights of recently liberated Negroes, and the statute when given the circa 1870 meaning, excludes Indians. Another case that dealt with the rights of an Indian against his tribe under 42 U.S.C.A. § 1981 et seq. is Seneca Constitutional Rights Organization v. George, 348 F.Supp. 48 (D.C. 1972), which held that:

> The court has been directed to nothing, and has found nothing, in the language of 42 U.S.C. §§ 1981 to 1987 or in the cases thereunder which indicates that by enacting the provisions Congress intended to strip Indian tribes of their quasi-sovereign immunity and to consent to suits against the tribes. It therefore holds that Indian tribes are immune to suits alleging violations of these sections. *Id.* at 50.

It is clear from the legislative history and from the case law that the plaintiffs have no cause of action against the Oglala Sioux Tribe, its agencies or officers under 42 U.S.C.A. §§ 1985, 1986, 1988, and the Court lacks a proper jurisdictional basis to proceed under these

claims. Post v. Payton, 323 F.Supp. 799 (E.D.N.Y.1971).

The result is the same when we consider the claim under 42 U.S.C.A. §§ 1985, 1986, 1988 against the defendants named as individuals. Although neither *Spotted Eagle, supra,* nor *Seneca, supra,* dealt specifically with this question, a helpful analogy can be drawn between suits against the tribe and suits against individuals. If 42 U.S.C.A. §§ 1985, 1986, 1988 provide no rights in the first instance because of their Civil War history and purpose, then it follows that the same reasons would render these sections inapplicable in the second instance. We therefore hold that 42 U.S.
[383] C.A. §§ 1985, 1986, 1988 provide no cause of action to the plaintiffs as against the Indian defendants named as individuals, and that this Court lacks jurisdiction to proceed under those claims.

We conclude that plaintiffs' only claim in this case that could possibly come within the jurisdiction of this Court is the claim under 28 U.S.C.A. § 1343 (4) and 25 U.S.C.A. § 1302(1), (8). Immunity from suit would bar jurisdiction in this case unless the Indian Civil Rights Act applies. Cherokee Nation v. State of Oklahoma, 461 F.2d 674, 681 (10th Cir. 1972); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 94 (8th Cir. 1956); Luxon v. Rosebud Sioux Tribe, 455 F.2d 698, 699 (8th Cir. 1972).

The plaintiffs in this case have alleged that jurisdiction over the subject matter of the complaint rests in 28 U.S.C.A. § 1343(4) which states:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

The plaintiffs have claimed violations of 25 U.S.C.A. § 1302(1) and (8) which provide that:

> No Indian tribe in exercising powers of self-government shall—
>
> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.

The plaintiffs claim that administrative election irregularities and fraud allegedly committed by defendants have violated their protected rights under § 1302(1), (8) and they rely on McCurdy v. Steele, 353 F.Supp. 629 (D.C.1973) for jurisdictional support and urge that case as controlling here. *McCurdy* is inapplicable here and is not controlling because that case involved parties other than Indians including the Bureau of Indian Affairs, and because the disputed conduct occurred in Nevada and not on an Indian reservation. McCurdy v. Steele,

353 F.Supp. 629, 638 n. 15 (1973). This Court did, however, take guidance from Luxon v. Rosebud Sioux Tribe of South Dakota, 455 F.2d 698 (8th Cir. 1972), and Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), cited therein, and ruled on April 4, 1974, that jurisdiction existed at least temporarily to prevent irreparable injury and to determine jurisdiction. In *Luxon*, the Eighth Circuit Court of Appeals stated:

> In our opinion, 28 U.S.C. § 1343(4) gives the district court jurisdiction to determine, *in a proper case*, whether an Indian tribe has denied to one of its members any of the rights given to the members under the Indian Bill of Rights. (Emphasis added.)

The difficulty here is in determining whether or not the plaintiffs have brought before this Court a "proper case."

[7, 8] The federal courts, in order to avoid unduly disrupting tribal government, have traditionally avoided involvement in intratribal controversies. This policy of federal judicial restraint is consistent with the present federal objective of preserving the Indian tribes as self-governing, culturally autonomous units. Kills Crow v. United States, 451 F.2d 323, 326-327 (8th Cir. 1971); note, The Indian Bill of Rights and the Constitutional Status of Tribal Governments, 82 Harv.L.Rev. 1343, 1359-60 and hearings cited (1969). The Indian Civil Rights Act appears to have been drafted by Congress to enhance the civil liberties of individual Indians without unduly undermining Indian self-government

and cultural autonomy. Its guarantees of individual rights should not operate
[384] to unduly disrupt tribal culture and should be harmonized with governmental autonomy. The purpose of the Act and the principle of federal judicial restraint dictate that an action involving an internal controversy among Indians over tribal government is a subject not within the jurisdiction of a federal court and not a "proper case" under *Luxon, supra*. Cornelius v. Moxon, 301 F.Supp. 783 (D.C.1969); Motah v. United States, 402 F.2d 1 (10th Cir. 1968); Green v. Wilson, 331 F.2d 769 (9th Cir. 1964). As a prerequisite to federal jurisdiction and involvement in intratribal government, the plaintiff must clearly show that the subject matter involved amounts to a "proper case" under 25 U.S.C.A. § 1302.

[9] We can quickly dispose of one part of the plaintiffs' claim under 25 U.S.C.A. § 1302 since it is clear from the language of the Act, its legislative history, and the case law that the Indian Civil Rights Act cannot be held to authorize civil actions for violations of the acts prescribed therein by individuals. We agree with the Court in Spotted Eagle v. Blackfeet Tribe of Blackfeet Indian Reservation, 301 F.Supp. 85 (1969), that:

> The Indian Civil Rights Act does not create rights as against individuals, and that, hence, within the meaning of 28 U.S.C.A. § 1343(4) there is no action authorized by law to be commenced against individuals. *Id.* at 90.

We therefore hold that 28 U.S.C.A. § 1343(4) and 25 U.S.C.A. § 1302 provide

no cause of action to the plaintiffs as against the Indian defendants named as individuals or as against the officers of the tribe as individuals and therefore this Court lacks jurisdiction to proceed on those claims.

[10, 11] The only claims remaining for our consideration then are plaintiffs' claims against the tribal agencies and the tribal officers under the Indian Civil Rights Act of 1968. This Court finds that it lacks jurisdiction to proceed on these claims because the available tribal remedies have not been exhausted. The plaintiffs acknowledge in their complaint the existence of tribal remedies. They allege that two election contests were filed before the Election Board, and were denied by the Election Board. They further acknowledge that no action has been obtained from the Tribal Council as is provided for in election ordinance 85g, and that no action has been filed in Tribal Court. The plaintiffs seem to take the position that failure of the Tribal Council to rule on the election contests is sufficient evidence of exhaustion. It could also be argued that plaintiffs' activities in investigating the election and initiating this action in federal court have had a disrupting effect on tribal processes designed to evaluate election disputes. The Tribe has clearly provided a reasonable process for election complaints, and the fact that the Tribal Council has not yet rendered a decision on the complex and numerous claims does not lead reasonably to the conclusion that resort to the Council is futile. We agree with the Eighth Circuit Court of Appeals' de-

cision in O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140 (8th Cir. 1973). The Court stated at page 1141 that the principal issue before them was "whether individual Indian plaintiffs, who fail to exhaust tribal remedies in civil disputes with the tribe, are prohibited from bringing suit in federal court on an action predicated essentially upon the Indian Bill of Rights." The Court answered that individual Indian plaintiffs must, with few exceptions, exhaust their tribal remedies. At page 1143, the Court established three questions to be answered so as to determine if dismissal is proper: (1) "What, if any, tribal remedies existed? (2) Should an exhaustion requirement generally be applied in cases such as this? (3) If exhaustion is generally required, is it appropriate to require exhaustion in this case?" The Court determined that two tribal remedies did exist which had not been utilized, and in a learned discussion they found that an exhaustion requirement should generally be applied and cited White Eagle v. One Feather, 478
[385] F.2d 1311 (8th Cir. 1973); Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959); Luxon v. Rosebud Sioux Tribe of South Dakota, 455 F.2d 698 (8th Cir. 1972); Dodge v. Nakai, 298 F.Supp. 17 (D.C.1968); and McCurdy v. Steele, 353 F.Supp. 629 (D.C.1973). The Court stated:

> It is clear to us that Congress wished to protect and preserve individual rights of the Indian peoples, with the realization that this goal is best

achieved by maintaining the unique Indian culture and necessarily strengthening tribal governments. *Id.* 482 F.2d at 1144.

The Court did recognize and discuss certain exceptions to the exhaustion requirement. In *Dodge, supra,* exhaustion was not necessary due to the presence of some defendants not subject to tribal court jurisdiction, and in *McCurdy, supra,* the only tribal forum was the tribal council being challenged by the plaintiffs. In McCurdy, however, the tribal council had specifically refused to deal with the plaintiffs at all. The present case falls within neither exception. All plaintiffs are subject to tribal jurisdiction, and although the present Tribal Council had a direct interest in the legality of the February 7, 1974 election, there is no reason to assume without proof to the contrary, that self interest would determine their decision. If the decision is adverse to the plaintiffs, they have the further remedy of Tribal Court. This Court does not believe that the judicial system of the Oglala Sioux Tribe, in intratribal controversies, has been demonstrated to be lacking in integrity.

The *O'Neal* court stated, as a general test for application of the exhaustion requirement, that the need to preserve the cultural identity of the tribe by strengthening the tribal courts must be weighed with the need to immediately adjudicate alleged deprivations of individual rights. On April 5, 1974, after full hearing and upon good cause having been shown, that the plaintiffs were in no danger of suffering immediate irreparable depriva-

tion of their individual rights, the *O'Neal* Court stated:

> In sum, we can find no persuasive reasons for not requiring exhaustion in this case. A general exhaustion requirement in cases such as this will do much to strengthen tribal governments, including tribal courts, and, thereby aid the reservation Indian in maintaining a distinct cultural identity. Id. 482 F.2d at 1148.

This Court finds that it is appropriate to require exhaustion in this case. It is the function and the affirmative obligation of the tribe in view of their unique ethnic and cultural identity to exercise original jurisdiction in intratribal controversies. This Court finds that because the plaintiffs have failed to exhaust available tribal remedies, this is not a "proper case" under 28 U.S.C.A. § 1343(4) and 25 U.S.C.A. § 1302 and under Luxon v. Rosebud Sioux Tribe of South Dakota, 455 F.2d 698 (8th Cir. 1972), O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1145–1148 (8th Cir. 1973), and this Court therefore lacks jurisdiction to proceed.

Although the finding that plaintiffs have failed to exhaust their administrative remedies would in and of itself dispose of plaintiffs' claims against the tribe and its officers under 25 U.S.C.A. § 1302, this Court prefers to dismiss the complaint on defendants' motion to dismiss for failure to state a claim upon which relief can be granted. Fed.R.Civ. P. 12(b)(6).

[12] It is clear that plaintiffs' claims under 28 U.S.C.A. § 1343(4) and 25 U.S.C.A. § 1302(1), (8) are insufficient in that they fail to state a claim upon which relief can be granted and the defendants' motion is hereby granted. The amended complaint, together with the affidavits filed in support thereof and made a part thereto, fail to disclose any violation of 25 U.S.C.A. § 1302(1), (8). The jurisdiction of this Court under § 1302 is limited to enforcing the provisions contained therein. It does not extend to insuring compliance with provisions of
[386] Oglala law, unless failure to comply constitutes a violation of the guarantees contained therein. In order to state a claim upon which relief can be granted the plaintiff must clearly allege facts that show a violation of the rights embodied in § 1302(1), (8). This the plaintiffs failed to do.

[13] This Court agrees with and adopts the rule laid down by the Eighth Circuit Court of Appeals that irregularities in the administration of local elections do not provide a constitutional basis for a federal court to set aside an election "in the absence of aggravating factors such as denying the right of citizens to vote for reasons of race," or "fraudulent interference with a free election by stuffing of the ballot box," or "other unlawful conduct which interferes with the individual's right to vote." Pettengill v. Putnam County, 472 F.2d 121, 122 (8th Cir. 1973).

The Court of Appeals in *Pettengill* indicated the kinds of electoral misconduct which it considered sufficient to

justify invalidating an election on constitutional grounds by citing United States v. Saylor, 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341 (1944), and 42 U.S.C.A. § 1985.

Saylor was a criminal case involving the prosecution of election officers under federal criminal statute for forging ballots in favor of a particular candidate "so as to create a false and fictitious return." 322 U.S. at 386, 64 S.Ct. at 1102. *See*, 18 U.S.C.A. § 241. This is one of a series of cases in which the courts have held that stuffing ballot boxes or falsifying returns is a federal crime under the various statutes which protect civil rights against willful interference. For example, in United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941), the defendants were charged with willfully altering and falsely counting and certifying ballots. The Court held that the right to vote is a right secured by the Constitution and, consequently, the intentional deprivation of that right by falsifying and falsely counting and certifying ballots is a federal crime. *See*, 18 U.S.C.A. §§ 241 and 242. Similarly, in United States v. Mosley, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355 (1913), a conspiracy by election officers to falsify returns by willfully disregarding the returns of certain precincts was held to be a federal crime. The Court held that ". . . the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box." 238 U.S. at 386, 35 S.Ct. at 905.

Thus, the Court of Appeals recognized in *Pettengill* that an election may be set aside where there has been electoral misconduct amounting to a crime under the federal criminal laws which protect citizens against interference with constitutional or civil rights. The election cases which have arisen under these laws involved an element of willful and deliberate interference by named defendants with the right to vote, rather than administrative procedural irregularities. *Classic, Saylor* and *Mosley* all involved a showing of willful criminal activity.

The second category of circumstances justifying the invalidation of an election according to the *Pettengill* decision is that in which 42 U.S.C.A. § 1985 would apply. As discussed earlier, this statute does not apply to Indians, but the statute serves here to give some additional insight and meaning into the *Pettengill* rule. 42 U.S.C.A. § 1985 authorizes a civil action for damages in case of injury or deprivation due to unlawful interference with certain federally protected rights. When, for example, there was a specific factual allegation that the named defendant ". . . came to appellant's house during the night of October 17, 1973, called him out and intimidated, threatened and coerced appellant against becoming a registered voter . . . assailed appellant in the nighttime and threatened to destroy or annihilate appellant, his possessions and his family . . . " a federal court had jurisdiction of the civil rights damage action under 42 U.S.C.A. § 1985. Similarly, in Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973), the named defendant

[387] sheriff destroyed the campaign literature of his opponent and arrested the distributor of the literature, a clear violation of rights protected by the First Amendment of the United States Constitution. Damages were awarded to the plaintiff, and the Court of Appeals affirmed:

> We hold that § 1985(3)'s protection reaches clearly defined classes. If a plaintiff can show that he was denied the protection of the law because of the class of which he was a member, he has an actionable claim under § 1985(3).

[14] Thus the *Pettengill* rule may be summarized as follows: Equal protection and due process provide a jurisdictional basis for a federal court to set aside a local election which is infected with specifically alleged conduct in violation of federal criminal laws or which constitutes such unlawful deprivation of civil rights as to result in a civil liability under 42 U.S.C.A. § 1985. *Pettengill* holds that the federal courts should not become involved in overseeing "the administrative details of a local election . . . in the absence of aggravating factors such as denying the right of citizens to vote for reasons of race, . . . or fraudulent interference with a free election by stuffing of the ballot box, . . . or other unlawful conduct which interferes with the individual's right to vote per 42 U.S.C. § 1985." 472 F.2d at 1. This Court should not set aside a tribal election unless Act in circumstances under the Indian Civil Rights

cumstances in which a non-Indian local election under the Fourteenth Amendment would not be set aside.

[15] In Pettengill v. Putnam County, 472 F.2d 121 (1973), of the 2,192 votes cast 1,466 votes were cast for and 726 votes were cast against the proposition and the proposition was declared to have passed by a margin of five votes over the required two-thirds majority. The plaintiffs claimed that five electors personally voting and six electors casting absentee ballots were not qualified to vote because they did not satisfy the residency requirements prescribed by law. The plaintiffs further claimed that two electors were not qualified to vote because they were not of lawful age when they applied for absentee ballots, that 116 electors cast absentee ballots which were void since there were irregularities in the application, delivery or execution of these ballots. The defendants were informed of these irregularities and were requested to hold a hearing on these 129 irregularities. The defendants declined to grant a hearing and denied the requests. The district court dismissed the complaint for want of jurisdiction and the Eighth Circuit Court of Appeals affirmed.

The plaintiffs in *Pettengill* attempted to posit the existence of federal jurisdiction on the theory that the defendants diluted their legal votes by counting illegally cast votes and that such state action amounted to a deprivation of their civil rights. The Eighth Circuit Court of Appeals rejected their theory stating:

> Appellants cite no cases, and we have found none, which authorize a federal court to be the arbiter of disputes over whether particular persons were or were not entitled to vote or over alleged irregularities in the transmission and handling of absentee voter ballots. 472 F.2d at 122.

The *Pettengill* court cited Powell v. Power, 436 F.2d 84 (2nd Cir. 1970), wherein six voters in a congressional primary election sought the intervention of the federal court, alleging that state officials had permitted a number of individuals to cast ballots in the election, which individuals were not qualified to vote under state law. In affirming the district court's denial of relief sought under the Voting Rights Act of 1965 and the Civil Rights Act of 1871, 42 U.S.C.A. § 1983, the Court said:

> In the plaintiffs' view, [these] federal statutes comprehensively protect their ballots against dilution by illegal voting, whether or not the dilution was willful or knowing. It is appropriate [388] to note at the outset that the plaintiffs do not claim any discrimination because of race. Thus, they face a considerable burden of persuasion in asserting so sweeping and novel a conception, one apparently never before asserted, so far as reported cases reveal. Were we to embrace plaintiffs' theory, this court would henceforth be thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for

> all manner of error and insufficiency under state and federal law. *Id.* at 86.

The Eighth Circuit Court of Appeals in *Pettengill* adopted and applied the *Powell* rationale and stated:

> In essence, the appellants' complaint asks the federal court to oversee the administrative details of a local election. We find no constitutional basis for doing so in the absence of aggravating factors such as denying the right of citizens to vote for reasons of race, . . . or fraudulent interference with a free election by stuffing of the ballot box, . . . or other unlawful conduct which interferes with the individual's right to vote per 42 U.S.C. § 1985. *Id.* 472 F.2d at 122.

We agree with the Eighth Circuit Court of Appeals and adopt their position in *Pettengill* to plaintiffs' claims here. The first claim of the Amended Complaint sets out plaintiffs' belief that in certain polling places, persons were allowed to vote who were not entitled to vote, and alleges irregularities in the transmission and handling of absentee voter ballots. These claims do not violate 25 U.S.C.A. § 1302(1). The claim does not violate the free exercise of religion, or freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances. Similarly, the claim does not violate 25 U.S.C.A. § 1302 (8) in that it does not offend the usual meaning of due process of law or of equal protection of the law. Seneca Con-

stitutional Rights Organization v. George, 348 F.Supp. 51 (D.C.1972); White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973).

In view of the principles of Indian self government and tribal autonomy in intratribal matters, a clear violation of one of the protected rights under 25 U.S.C.A. § 1302 must be shown to state a proper claim. In plaintiffs' first claim they have simply alleged irregularities in election administration. This Court does not require that Indian tribes achieve a freedom from error in the administration of elections which the states need not adhere to under *Pettengill* and *Powell*. As the Court stated in Powell v. Power, 436 F.2d 84, 88 (2nd Cir. 1970):

> . . . we cannot believe that the framers of our Constitution were so hypersensitive to ordinary human frailties as to lay down an unrealistic requirement that elections be free of any error. *Id.* at 88.

[16, 17] Plaintiffs' second claim of their twice amended complaint sets forth their belief that threats were made and action taken against those who did not support candidate Wilson. This claim is vague and patently insufficient because it is not supported by allegations of specific facts showing a purposeful deprivation of protected rights under 25 U.S.C. § 1302(1), (8) by defendant tribe or by defendant tribal officers acting within the scope of their official office. To state a proper claim under 25 U.S.C.A. § 1302 the assaults or threats or whatever else claimed, must be tied

directly to the tribe or its officers acting within the scope of their official tribal office. The nexus here is not only unclear, it is nonexistent. While the plaintiffs make conclusory statements as to someone's intent to discriminate against them, they do not make any factual allegations indicating "a purposeful discrimination between persons or classes of persons." Snowden v. Hughes, 321 U.S. 1, 10, 64 S.Ct. 397, 402, 88 L.Ed. 497 (1944). This Court follows the rule that civil rights complaints which
[389] contain only broad conclusory allegations of violations which are not supported by specific allegations of fact showing an intentional and purposeful deprivation of rights by the defendants, including direct participation of the defendant official in the alleged deprivation, must be dismissed for failure to state a claim. Eisman v. Pan American World Airlines, 336 F.Supp. 543 (E.D. Pa.1971); Wallach v. City of Pagedale, 359 F.2d 57 (8th Cir. 1966); Mahurin v. Moss, 313 F.Supp. 1263 (E.D.Mo. 1970); Brooks v. Peters, 322 F.Supp. 1273 (E.D.Wis.1971); Robinson v. McCorkle, 462 F.2d 111 (3rd Cir. 1972); Jennings v. Davis, 339 F.Supp. 919 (W.D. Mo.1972); Sanberg v. Daley, 306 F Supp. 277 (N.D.Ill.1969).

Plaintiffs' third claim and fourth claim are insufficient in that they are not supported by allegations of specific facts showing a purposeful deprivation of protected rights by the defendant tribe or defendant tribal officials acting within the scope of their authority. Seneca Constitutional Rights Organization v. George, 348 F.Supp. 51 (D.C.

1972). As noted earlier, the United States Government, the Department of Interior, and the Bureau of Indian Affairs are not parties to this litigation. Allegations directed at these nonparties do not state a claim against the tribe or its officers under 25 U.S.C.A. § 1302. The "tribal police force" is described in the plaintiffs' fourth claim as an "auxiliary private police force." Other allegations are made against "agents of the federal government" and "private individuals." This Court concludes that allegations directed against nonparties, individuals, a private police force, and unidentified person not linked in any way to the tribe or its officers, do not constitute allegations of unlawful conduct under § 1302 by the defendant tribe or its officers acting within the scope of their offfice.

[18] Some courts have doubted that the federal courts have jurisdiction over tribal elections under 25 U.S.C.A. § 1302, *see*, Groundhog v. Keeler, 442 F.2d 674, 682 (10th Cir. 1971), but certainly no jurisdiction exists unless a claim is complete and supported by well-pleaded facts including facts which show that a good faith resort to available tribal remedies has failed. Solomon v. LaRose, 335 F.Supp. 715 (D.Neb.1971). Here the complaint states no claim upon which relief can be granted.

Upon careful consideration and for all the above reasons, the defendants' motion to dismiss is hereby granted and plaintiffs' complaint under 25 U.S.C. § 1302(1), (8) against the Oglala Sioux Tribe and its officers is dismissed for failure to state a claim upon which relief can be granted.